

CompTel

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VIA HAND DELIVERY

Ms. Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC, 20554

Mr. David Solomon
Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC, 20554

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Federal Communications Commission
Office of the Secretary

Re: *In the Matter of the Merger of Qwest Communications
International, Inc. and U S West Inc., CC Docket No. 99-272*

Dear Ms. Attwood and Mr. Solomon:

On behalf of the Competitive Telecommunications Association ("CompTel") and its members, I am writing to express concerns raised by the April 16, 2001 Report of the Independent Public Accountants ("Auditor's Report" or "Report") prepared by Arthur Andersen LLP ("Auditor") and the April 16, 2001 certification by Qwest ("Qwest Certification"). These documents were submitted pursuant to the Commission's Orders conditionally approving the Qwest-US WEST merger.¹ As discussed below, CompTel believes the Auditor's Report demonstrates that Qwest has violated both the terms of the

¹ Memorandum Op. and Order, *Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd. 5376, ¶¶ 27, 70, 71 (March 10, 2000) ("March 2000 Merger Order"); Memorandum Op. and Order, *Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 11909, ¶ 42 (June 26, 2000) ("June 2000 Merger Order").

Final Divestiture Plan approved by the Commission's June 2000 Merger Order and Section 271 of the Telecommunications Act of 1996.

After reviewing these documents, CompTel is concerned that the Auditor's Report asserts that Qwest is in compliance with the divestiture requirements contained in the Commission's Orders when the Report seems to clearly demonstrate otherwise. The Commission's Orders approving the Qwest-US WEST merger required the divestiture of Qwest's in-region interLATA services, customers and assets in the 14-state US WEST region to ensure the merged company would comply with the requirements of Section 271. The fact that "certain non-metered services (e.g., private line services) for 266 customers were billed and branded as Qwest services"² through December 31, 2000 thus appears to be a clear violation of the Final Divestiture Plan, and by extension, Section 271.

CompTel does not agree with Qwest's characterization that these "minor billing and collection variances do not constitute a violation of Section 271 because Qwest did not *provide* any prohibited interLATA service."³ (*emphasis added*) The Commission previously made very clear that the term "providing" in Section 271 encompasses more than the physical transmission of telecommunications across LATA boundaries.⁴ Indeed, the Commission found that a Bell Operating Company "provides" interLATA service when it holds itself out to the public as a provider of long distance service.⁵ This included a prohibition on "branding" of in-region interLATA services prior to Section 271 authorization. Both the Auditor's Report and the Qwest Certification do not dispute the fact that prohibited in-region interLATA services were billed and branded as Qwest services during the audit period.

Further, the Commission should reject Qwest's argument that this obvious violation of Section 271 is not material due to the relatively small number of customers and revenues affected.⁶ First, the Commission has previously found that allowing a Bell Operating Company to hold itself out as a provider of long distance services prior to 271 authorization generates long-term strategic benefits that extend well-beyond any short-term financial gains, such as the ability to "strengthen and entrench their relationships with their in-region local customers."⁷ Second, the Commission would totally undermine Section 271 if it only enforced these requirements based on the "size" of each violation.

For the foregoing reasons, CompTel asks the FCC to impose appropriate penalties on Qwest for violating the Commission's Orders and Section 271. Without vigilant and responsive enforcement, the Commission's Orders are in danger of becoming nothing more than suggestive considerations, rather than binding law.

² Auditor's Report, Attachment 1.

³ Qwest Certification, ¶ 11.

⁴ *AT&T Corp. v. Ameritech Corp.* 13 FCC Rcd. 21438 (1998), ¶ 34.

⁵ *Id.*, ¶¶ 45, 50.

⁶ Qwest Certification, ¶ 9.

⁷ *AT&T v. Ameritech*, at ¶ 42.

CompTel would also like to address some significant shortcomings of the Auditor's Report. First, the Auditor examined Qwest's assertion that it complied with the Commission's Orders and Section 271 rather than the company's actual compliance with these legal and regulatory requirements. This conflicts with language in the FCC's March 2000 Merger Order, which stated that "[t]he auditor shall perform an annual examination engagement regarding the merged company's *on-going* compliance with section 271, by evaluating the relationship between the merged entity and the buyer."⁸ (*emphasis in original*) In other words, CompTel believes that the Auditor's Report misses the mark, since it is based on the Auditor's examination of Qwest's *assertions* about its compliance rather than a review of Qwest's *actual* compliance.

Second, CompTel is concerned about the manner in which the Auditor presented its findings. The March 10 Merger Order required the Auditor to immediately report any *potential* section 271 violations to the Chief of the Common Carrier Bureau.⁹ (*emphasis added*) CompTel is troubled by the Auditor's decision to relegate a discussion of Qwest's provision of prohibited in-region interLATA services to an *attachment* to the Audit Report. The Audit Report simply describes Qwest's provision of in-region interLATA services as "variances" from the Final Divestiture Plan and FCC Orders "which did not impact [the Auditor's] opinion on management's assertion as a whole". CompTel firmly disagrees with the Auditor's assessment that these are mere variances, which do not undermine Qwest's assertion that it is in compliance with Section 271. CompTel believes that Qwest's provision of prohibited in-region interLATA services *is* a *potential* Section 271 violation that should have been described in the Audit Report. At the very least, the Auditor should have included some explanatory language concerning why these apparent violations do not constitute material non-compliance.

Finally, CompTel believes that guidance provided by Accounting Safeguards Division Staff at the May 1, 2001 meeting on audit issues will prevent such deficiencies in future audit reports. CompTel applauds Commission staff for proposing the new guidelines, particularly a requirement that public audit reports should be sufficiently detailed to allow end users to understand a carrier's compliance situation. CompTel believes these new guidelines will enable our members, and the public, to better utilize audit reports, particularly audits of federal merger conditions. We therefore encourage you to adopt these new guidelines on an expedited basis.

Sincerely,



Jonathan Lee
Vice President, Regulatory Affairs

⁸ March 2000 Merger Order, ¶ 27.

⁹ *Id.*